IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-536

NASHVILLE GAS COMPANY,

Petitioner,

—v.—

NORA D. SATTY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICI CURIAE* OF AMERICAN CIVIL LIBERTIES UNION AND WOMEN'S LEGAL DEFENSE FUND

JUDITH LICHTMAN
Women's Legal Defense Fund
1424 16th St., N.W.
Washington, D.C. 20036

RUTH BADER GINSBURG
MARJORIE MAZEN SMITH
SUSAN DELLER ROSS
KATHLEEN WILLERT PERATIS
JOEL GORA
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

Attorneys for *Amici Curiae*

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BRIEF AMICI CURIAE

Interest of Amici [1]

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members dedicated to defending the right of all persons to equal treatment under the law. Recognizing that confinement of women's

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1 This brief is filed with consent of the parties. The letters of consent have been filed with the Clerk of the Court.

opportunities is a pervasive problem at all levels of society, public and private, the American Civil Liberties Union has established a Women's Rights Project to work towards the elimination of gender-based discrimination. The American Civil Liberties Union believes that this case, concerning the Title VII rights of work force members disabled due to pregnancy, poses an issue of great significance to the achievement of full equality between the sexes.

The American Civil Liberties Union has participated in a number of cases involving government and employer rules subjecting women who bear children to disadvantageous treatment. The Union acted as amicus curiae in Cohen v. Chesterfield County School Board and Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), which declared inconsistent with due process forced termination of a teacher's employment at a fixed stage of pregnancy, in Geduldig v. Aiello, 417 U.S. 484 (1974), which upheld, against an equal protection challenge, the exclusion of women disabled by childbirth from a state-operated social insurance program, and in Wetzel v. Liberty Mutual Insurance Co., 511 F. 2d 199 (3d Cir. 1975), vacated on juris. grounds, 424 U.S. 737 (1976), and General Electric Co. v. Gilbert, 97 S. Ct. 401 (1976), both concerning the Title VII rights of working women disabled by pregnancy. Lawyers for the American Civil Liberties Union were counsel for the petitioners in Struck v. Secretary of Defense, 461 F. 2d

1372 (9th Cir. 1971, 1972), cert. granted, 409 U.S. 947, judgment vacated and case remanded for consideration of mootness, 409 U.S. 1071 (1972), which challenged the attempt by the Air Force to discharge Captain Struck for pregnancy, and Turner v. Department of Employment Security, 423 U.S. 44 (1975), which held inconsistent with due process a state law declaring pregnant women ineligible for unemployment compensation from twelve weeks before until six weeks after childbirth.

With regard to sex-based discrimination generally, lawyers associated with the American Civil Liberties Union presented the appeal in Reed v. Reed, 404 U.S. 71 (1971), participated as counsel for the appellants and later as amicus curiae in Frontiero v. Richardson, 411 U.S. 677 (1973), represented the appellant in Kahn v. Shevin, 416 U.S. 351 (1974), the appellees in Edwards v. Healy, 421 U.S. 772 (1975), Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Califano v. Goldfarb, 45 U.S.L.W. 4237 (March 2, 1977), and acted as counsel for petitioners, appellants, appellees, and amicus curiae in this Court in several other gender discrimination and women's rights cases.

Women's Legal Defense Fund ("Fund") is a non-profit, tax-exempt corporation founded in 1971 to secure equal rights for women, by providing volunteer legal representation in cases raising sex discrimination issues. The Fund also sponsors informational and educational

activities on legal issues of special interest to women. Many of the activities of the Fund involve employment discrimination against women.

Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 522 F. 2d 850. The opinion of the United States District Court for the Middle District of Tennessee is reported at 384 F. Supp. 765 (1974).

Statute and Regulation Involved

Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a) (1974) (hereinafter "Title VII"), in pertinent part provides:

> It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's...sex...; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which

> would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's...sex... .

Section 1604.10(b) of the Equal Employment Opportunity Commission (EEOC) Sex Discrimination Guidelines, 29 C.F.R. §§1604.1-1604.10, in pertinent part provides:

> Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and...reinstatement... shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

Question Presented

Does an employer's policy of stripping female employees of their earned, accumulated job-bidding seniority rights following mandatory disability leave for childbirth violate Title VII of the 1964 Civil Rights Act? [2]

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[2] Also presented is the question whether an employer, consistent with Title VII, may refuse to permit female employees to (FN Continued on Next Page)

Statement of the Case

Amici incorporate the Statement of the Case set out in Brief for Respondent.

Summary of Argument

In General Electric Co. v. Gilbert, 97 S. Ct. 401 (1976) this Court recognized that a pregnancy classification may constitute sex discrimination forbidden by Section 703(a) of Title VII where it is a "mere pretext designed to effect an invidious discrimination." The employer policy in this case--stripping earned seniority rights from women on disability leave for childbirth while other temporarily disabled employees retain full job-bidding seniority--is just such a pretext.

Depriving female, pregnant employees of competitive seniority has a severe, lifelong effect upon women who combine careers with families, ensuring their relegation to less desirable jobs, permanently depriving them of income and rendering them permanently more susceptible to unemployment than their male

(FN 2 Continued) use accumulated sick leave for pregnancy-related absences.This issue is briefed in Richmond Unified School District v. Berg, No. 75-1069, cert. granted, 45 U.S.L.W. 3499 (Jan. 25, 1977), and is not addressed by amici.

colleagues of equal actual seniority. Cf. Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). The pretextual nature of the employer's policy is evidenced by the lifelong impact of the policy and its total lack of business justification. In contrast to Gilbert, the employer incurs no added cost by assuring women on brief pregnancy-related disability leaves the same job-bidding seniority accorded others temporarily unable to work. Thus no "extra compensation" issue is present. Although Title VII does not require that greater economic benefits be paid to one sex or the other "because of their different roles in the scheme of existence", by the same token Title VII hardly permits an employer specifically to burden female employees throughout their working lives because of their different role.

The Gilbert Court noted that a pregnancy classification can also violate §703(a) even absent proof of intent if it has the effect of discriminating against women. In this case the requisite showing of gender-based effect has been made. The seniority-stripping practice makes men's employment far more valuable than that of women with identical employment records. A man with the same initial date of hire and the same number of days absent for disability will, unlike Nora Satty, retain his job. His retained job-bidding seniority will entitle him to attain the more interesting and better-paying jobs, thus ensuring that he will earn more money than female,

child-bearing employees over their entire careers. This totally gratuitous burden placed on the woman who works and has children is difficult to view as other than a lingering hangover from the days when pregnancy was viewed as "obscene."

The EEOC, the agency charged with identifying specific employment practices inconsistent with Title VII, has specified that practices involving "accrual of seniority...and reinstatement ...shall be applied to disability due to pregnancy or childbirth on the same terms...as...to other temporary disabilities." 29 C.F.R. Sec. 1604.10 (b). In stark contrast to Gilbert, the factors giving the EEOC's interpretation "power to persuade" are present in this instance: (1) the interpretation is consistent with EEOC's earlier pronouncements; and (2) no position in conflict with EEOC's has been taken by any other federal authority concerned with the implementation of legislation proscribing sex discrimination.

In sum, Petitioner's invitation to this Court to adopt in Title VII's name an "anything goes" approach to personnel policies regarding pregnancies should be firmly declined. Where, as in the instant case, there is no business reason for the policy, the policy involves deprivation of an accumulated right rather than the mere withholding of an added benefit, and where the policy harms working women throughout their careers, the policy must be recognized for what it is--invidious discrimination against women.

ARGUMENT

IT IS A VIOLATION OF TITLE VII FOR AN EMPLOYER TO STRIP FEMALE EMPLOYEES OF ALL EARNED, JOB-BIDDING SENIORITY RIGHTS UPON COMMENCEMENT OF A DISABILITY LEAVE FOR CHILDBIRTH WHEN EMPLOYEES ON LEAVE FOR ALL OTHER DISABILITIES RETAIN THEIR JOB-BIDDING SENIORITY RIGHTS.

Introduction

In General Electric Co. v. Gilbert, 97 S. Ct. 401 (1976), this Court held that an employer's disability benefit plan did not violate Title VII because of its failure to cover pregnancy-related disabilities. These reasons were offered in support of the Court's judgment:

(1) Exclusion of pregnancy from a risk insurance plan is not per se gender-based discrimination;

(2) In the context of a disability benefits plan, which is nothing more than an insurance package covering some risks and excluding others, and where overall benefits to women were at least as high as benefits to men, exclusion of pregnancy could not be deemed a simple pretext for discriminating against women;

(3) A prima facie violation of Title VII is established where the effect of an otherwise facially neutral classification is to discriminate against members of one class or another, but the plaintiffs had not shown that GE's risk inclusion plan produced such effects;

(4) The relevant EEOC guideline, to the extent that it requires employers to insure disabilities caused by pregnancy on the same terms and conditions as other temporary disabilities, conflicts with the legislative history of Title VII, earlier EEOC pronouncements, interpretation by the Wage and Hour Administrator of the Equal Pay Act, and the "plain meaning" of the language of Section 703(a)(1).

The practice addressed in this brief--stripping female employees of all earned, job-bidding seniority rights when such women are disabled by childbirth, however long term their employment, however short their disability leave--is hardly comparable to the even-handed risk inclusion plan the Court described in Gilbert. Rather, the employer's seniority-stripping practice, which effects no cost savings whatever, is indeed a simple pretext for discrimination against women. The gender-based effects of the practice are as devastating as they are inevitable. The EEOC's position, declaring the practice at odds with Title VII, conflicts with no other official interpretation of equal employment opportunity requirements

and is fully consonant with the core purpose of Title VII and with the Commission's earlier pronouncements.

A. Stripping Women Employees Disabled by Childbirth of All Earned, Job-Bidding Seniority is a "Pretext Designed to Effect an Invidious Discrimination" Against Women. The Practice Serves no Valid Employer Purpose and Its Discriminatory Effect Upon Women is Both Devastating and Inevitable.

While this Court held in General Electric Co. v. Gilbert that a pregnancy classification "was not in itself discrimination based on sex," 97 S. Ct. at 407, it nevertheless recognized that a pregnancy classification may discriminate on the basis of sex

> should it be shown "that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other." Id. at 407-408.

The pregnancy classification at issue in this case is just such a pretext. The employer policy of stripping earned seniority rights from women forced to go on disability leave for childbirth and recuperation therefrom has no business justification at all. Its impact in this case was to deprive the plaintiff of her job. Its impact even on a woman fortunate enough to gain reemployment

would persist for a lifetime. The policy insures that women who combine careers with families will remain far behind male colleagues of equal actual seniority. By the simple mechanism of stripping these women of earned, job-bidding seniority, the employer assures their relegation to the less desirable jobs, permanently deprives them of income available to their male peers, and renders them permanently more susceptible to unemployment.

Nashville Gas Company, the employer in this case, forced respondent Nora Satty, after over four years as an employee, to commence maternity leave on December 29, 1972; her child was born on January 23, 1973 [3], and she returned to work as a temporary employee on March 14, 1973, close to the earliest date possible under Respondent's mandatory leave policy.[4] This temporary work ended approximately six weeks later, and no permanent post at Nashville Gas was offered to Nora Satty.

The company's policy was to allow employees temporarily disabled for a reason other than childbirth to retain full job-bidding seniority until ready to return to work. App. 44. A woman

3 Ms. Satty does not challenge here the forced leave of nearly one month prior to childbirth.

4 Petitioner required female employees to remain out of work for six weeks after giving birth. App. 65, 104.

required to stop work to give birth, however, was stripped of her accumulated seniority for job-bidding purposes. The significance of the woman's years of work for the company was reduced by Petitioner, for job retention purposes, to a simple preference over new applicants for employment.[5] The impact of this policy on Nora Satty was described by the district court:

> [p]laintiff returned from pregnancy leave as a temporary employee after more than four (4) years of continuous employment...and defendant failed to place her in one of several permanent job openings. All of these openings were filled by other employees credited with greater job-bidding seniority even though plaintiff had the earlier date of initial employment... . [F]ailure to credit plaintiff with seniority for this purpose is the sole reason she failed to gain a

5 The fact that another woman may have replaced Nora Satty when she lost her job-bidding seniority is immaterial in determining whether a violation of Section 703(a)occurred, since the law requires that no individual be discriminated against on account of sex. See, e.g., Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (positions closed to Ida Phillips because she had a pre-school child were filled predominantly by women).

> permanent position with defendant following her return from maternity leave. [6] App. 44.

As is increasingly true throughout the employment system of this country, see Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), Nashville Gas uses employee seniority as "the primary factor in the job-bidding process." App. 44. This Court noted in Franks that:

> Seniority principles are increasingly used to allocate entitlements to scarce benefits among competing employees ('competitive status' seniority). 424 U.S. at 766.

For this reason, the Court stressed:

> [T]he issue of seniority relief cuts to the very heart of Title VII's primary objective of eradicating present and future discrimination... . "Seniority, after all, is a right which a worker exercises in each job movement in the future, rather than a simple one-time payment for the past." Id. at 768 n. 28.

As the Court earlier explained,

> [C]ompetitive status seniority has become of overriding importance and one of its major functions is to

6 It is established that Section 703(h) of Title VII does not exempt a seniority practice which is itself discriminatory
(FN Continued on Next Page)

> determine who gets or who keeps an available job. Humphrey v. Moore, 375 U.S. 335, 346-347 (1964).[7]

In short, the importance of the issue in this case to gainfully-employed women cannot be gainsaid.[8]

In Gilbert, this Court found no basis for concluding that General Electric's disability insurance plan "worked to discriminate against any definable group or class." Indeed, the evidence indicated that GE's disability plan costs ran substantially higher for female

(FN 6 Continued) from coverage by Title VII. See Franks v. Bowman Transportation Co., 424 U.S. 747, 760 n. 16 (1976); Local 189, United Papermakers v. United States, 416 F. 2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970).

7 Cf., e.g., Local 189, United Papermakers v. United States, supra, 416 F. 2d at 980 (recognizing the far-reaching discriminatory impact upon black employees of maintaining a job-bidding system which gave blacks credit only for departmental seniority, not plant seniority, where the departments had previously been racially segregated).

8 Approximately half of all married women are in the labor force between the ages of 16 and 24, prior to starting a family; at least 40% of these women are employed during their mid-twenties to mid-thirties. United States Dept. of Labor, 1975 Handbook on Women Workers 19 (1975).

About 40% of pregnant women are employed during pregnancy. United States
(FN 8 Continued on Next Page)

than male employees. 97 S. Ct. at 405. The Court noted that burdening GE with insuring pregnancy as an additional risk would be tantamount to requiring extra compensation for female employees. Id. at 409 n. 17. In contrast, the employer here incurs no added cost by assuring women on brief pregnancy-related leaves the same job-bidding seniority accorded others temporarily unable to work.[9] The Nashville Gas seniority-stripping practice is simply

(FN 8 Continued) Dept. of Health, Education and Welfare, National Center for Health Statistics Report, Series 22, No. 7 at 16 (Sept. 1968).

9 Petitioner claims the policy is even-handed because employees who takes leaves for educational purposes are also denied job-bidding seniority. This claim is specious. As Petitioner conceded, App. at 42. There is simply no question that a pregnant woman at term is physically unable to pursue gainful employment for anywhere from one to several weeks. Thus, the valid comparison is not between pregnant employee and one who decides to take time off for study or travel although he or she is perfectly able physically to work, but between women employees disabled by childbirth or recuperation therefrom and other sick or temporarily disabled employees who enjoy full retention of job-bidding seniority. The voluntariness of many pregnancies, although
(FN 9 Continued on Next Page)

a device to determine which one, among competing, qualified job candidates, will get the post. Under the practice, Nashville Gas prefers employees with less company service than women in Nora Satty's situation. Absent the practice, the more senior employee would fill the vacant slot or have first option on transfer to a more desirable post.

Thus, no "extra compensation" issue is present, no added cost for employers, only the question whether a class of physically disabled workers, all of whom are women[10], may be deprived of their most crucial accumulated seniority right, and thus forced to face the immediate prospect of unemployment, as well as other long-term

(FN 9 Continued) arguably relevant in the disability insurance context (where a primary purpose of the benefit is to enable a wage-earner to cope with an unexpected loss of income), is irrelevant in this context, where no added compensation for females or cost considerations are involved.

10 It is well-established that an employer's policy may violate Section 703(a) of Title VII even though it affects only a sub-class of women workers. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

disadvantages throughout their working lives, when no other class of temporarily disabled employees is put at such a disadvantage. [11]

Gilbert held that Title VII does not require that greater economic benefits be paid to one sex or the other "because of their differing roles in the'scheme of existence'." 97 S. Ct. at 409. By the same token, Title VII hardly permits an employer specifically to burden female employees throughout their working lives because of their different role. But that, precisely, is the design and effect of the Nashville Gas seniority-stripping practice applied to Nora Satty. See Jacobs v. Martin Sweets Co., ____ F. 2d ____, 14 FEP Cases 687 (6th Cir. 1977) (post-Gilbert ruling that discharge for pregnancy violates Title VII).[12] As the Sixth Circuit put it, the Gilbert

11 Note, too, that as Petitioner reads Title VII, an employer rule requiring outright discharge of a pregnant woman would not violate the statute. Brief for Petitioner at 14-15.

12 Compare Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) (state employee's right to due process is infringed by mandatory, fixed-duration pregnancy leave), with Brief for Petitioner at 14-15 (contending that pregnancy classifications--whatever they may be--fall outside the realm of Title VII).

holding

> that exclusion of pregnancy from the risks covered by an employer's disability benefits plan does not violate Title VII, can hardly be regarded as precedent for excluding pregnancy from protection against invidious employment termination. (emphasis in original).

The Court explained that because

> pregnancy is a condition unique to women...termination of employment [or loss of job-bidding seniority] because of pregnancy has a disparate and invidious impact upon the female gender. Id. at 691.

The facts presented here--the long-term impact on women workers combined with the absence of any business justification--create a necessary inference that the Nashville Gas seniority-stripping policy is a mere pretext designed to effect invidious discrimination against women workers. As this Court pointed out in Washington v. Davis, 426 U.S. 229, 242 (1976), even in cases brought under the Fourteenth Amendment, where the plaintiff's burden is heavier than under Title VII,

> ...discriminatory impact...may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on [non-sex] grounds.

Mr. Justice Stevens' concurring opinion further explained:

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. Id. at 253.

This Court has also noted, in the National Labor Relations Act context, that

> some conduct may by its very nature contain the implications of the required intent [to discriminate or to interfere with union rights]. NLRB v. Erie Resistor Corp., 373 U.S. 221 (1962).

Indeed, this Court has also stated that some conduct

> is so "inherently destructive of employee interests"... [and] carries with it "unavoidable consequences which the employer not only foresaw, but which he must have intended" [that it] bears "its own indicia of intent". NLRB v. Great Dane Trailers, 388 U.S. 26, 33 (1966).

In Erie Resistor Corp., an employer's award of "superseniority" to employees who worked during a strike had an obviously harmful impact upon the protected group of

unionized, striking workers, and was therefore held impermissible despite the absence of any showing of subjective intent to discriminate. Similarly, Petitioner's policy must be seen as a pretext to discriminate against women. For the policy, which was not shown to have any business justification, impacts solely, conspicuously, and devastatingly upon women by stripping them of a status they have earned. See "Note, Reading the Mind of the School Board: Segregative Intent and the DeFacto/DeJure Distinction," 86 Yale L.J. 317, 334-336 (1976). It must therefore be invalidated under Section 703(a) of Title VII.

B. Stripping Female Employees on Disability Leave for Childbirth of Earned Job-Bidding Seniority Rights Inevitably and Effectively Discriminates Against Women and is Therefore Prohibited by Section 703(a) of Title VII.

This Court reiterated in Gilbert that a violation of Title VII can be established by proving that

> the effect of an otherwise facially neutral plan or classification is to discriminate against members of one class or another...even absent

proof of intent. 97 S. Ct. at 408 (emphasis in original).[13]

The Court further held that the women employees in Gilbert had not made "the requisite showing of gender-based effects" because the plan at issue was an insurance package with a facially even-handed inclusion of risks, and there was "no proof that the package is in fact worth more to men than to women." Id. at 409.

In sharp contrast to Gilbert, the seniority-stripping practice at issue here does not involve an even-handed insurance program, and it makes men's employment far more valuable than that of women with identical employment

13 Justice Rehnquist's opinion in Gilbert suggested that proof of intent to discriminate might be required in cases brought pursuant to Section 703(a)(1), but that it was difinitely not required in cases brought pursuant to Section 703(a)(2) of Title VII. Ms. Satty's discrimination claim is based on both Section 703(a)(1) and 703(a)(2) of Title VII. See Complaint at par. 13(g) and (j), and par. 9, App. 5-6. She was therefore not required to prove that Nashville Gas intended to discriminate against its women workers in stripping them of earned seniority rights to establish that the company violated Title VII.

records with the Nashville Gas Company. For a man with precisely the same initial date of hire and precisely the same number of days absent for disability as a woman who goes on disability leave for childbirth will, unlike Nora Satty, retain his job. And since his seniority will entitle him to attain more interesting and better-paying jobs than child-bearing women with identical employment records, he will earn more money than they do over their entire working careers. Thus, the requisite showing of gender-based effect has been made.

Nor has Nashville Gas established a business necessity defense to this showing. Throughout this litigation, the employer has not proferred the slightest business-related justification for its policy of stripping a pregnant woman of all her earned, accumulated job-bidding seniority, however long-term her employment, however short her absence due to childbirth. While it is difficult to conceive of a valid business reason for this employer policy,[14] it is significant that Petitioner has never even suggested that its policy was related to its business needs.

14 Indeed, it would appear that the employer actually suffers by virtue of this policy, since he loses the benefit of the skills acquired by the more senior employee.

In effect, what this employer is asserting is that any employer policy relating to pregnancy is immune from attack under Title VII, because no pregnancy classification can involve sex discrimination. Thus, an employer would be free to fire pregnant women, to force them out on long leaves of absence when they are able to work,[15] to refuse to hire pregnant women, and to strip them of any and all vested seniority rights, including not only the job-bidding seniority at issue here but also benefit seniority affecting ultimate entitlement to and rights under such programs as retirement plans.

Such disparate and harsh treatment of pregnant women is not illusory; women workers have been forced to attack all these policies. On two recent occasions, this Court emphasized that working women have been the victims of "long-standing disparate treatment" and "role-typing." Califano v. Goldfarb, 45 U.S.L.W. 4237, 4240 n. 8 (March 2, 1977); Califano v. Webster, 45 U.S.L.W. 3630 (March 21,1977) (per curiam).[16] Pregnancy and childbirth

15 Cf. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

16 In Webster, the Court concluded that the 1972 Congressional change in the Social Security Act, which equalized the treatment of men and women by extending to men the three-year benefit computation advantage previously reserved for women,

(FN 16 Continued on Next Page)

have played a central role in creating this "disparate treatment" and "role-typing" of women workers. Employers have refused to train women for management positions on the grounds that women might become pregnant, Hodgson v. Security National Bank, 460 F. 2d 57, 62 (8th Cir. 1972); they have refused to hire women for other positions because they might become pregnant, Cheatwood v. South Central Bell Telephone Co., 303 F. Supp. 754 (M.D. Ala. 1969); they have fired

(FN 16 Continued) did not constitute an admission that the previous policy was discriminatory. The Court observed that

> Congress has in recent years legislated directly upon the subject of unequal treatment of women in the job market [and] may well have decided that [t] hese reforms...have lessened the economic justification for the [differential]. Ibid.

Court decisions which have uniformly invalidated the termination of female employees for pregnancy are undoubtedly part of the reason for whatever improvements in women's economic conditions Congress perceived in 1972. See, e.g., Doe v. Osteopathic Hospital, 333 F. Supp. 1357 (D. Kan. 1971); Bravo v. Board of Education, 345 F. Supp. 155 (N.D. Ill. 1972); Williams v. San Francisco School District, 340 F. Supp. 438 (N.D. Cal. 1972).

women just for getting married, Sprogis v. United Air Lines, Inc., 444 F. 2d 1194 (7th Cir.), cert. denied, 404 U.S. 991 (1971); and they have refused to hire mothers of pre-school age children, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

Employers without a stimulus to re-examine old notions assume that women want to, or believe that women should, spend full time taking care of their children.[17] Thus employers view these discriminatory policies as fully justified. Such customary employer beliefs blind them to the reality that a large and ever-increasing percentage of women with children are employed outside the home. In fact, one-third of all mothers with pre-school age children are in the work force, [18] and as is the case with pregnant

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17 In this case, Petitioner Nashville Gas claimed the right to determine when a pregnant employee would commence maternity leave based not only on the company's interests but also on its evaluation of "the welfare of the mother and the unborn child." App. 9-10. After childbirth, women were denied the right to return to work for at least six weeks.

18 In 1975, 32.7% of mothers with children under three years old were in the work force, as were 41.9% of mothers with children aged three to five, and 52.3% of mothers with children aged six to
(FN 18 Continued on Next Page)

women, many of them of them work out of dire economic necessity. [19] The employer view that mothers and expectant mothers are not or should not be attached to the labor market and therefore may be deprived of standard seniority rights and employment offered other workers is not only inaccurate and unfair to women workers; it can also have severe consequences for the economic well-being of women's families. This impact will be most severe on minority families, since a disproportionate number of them are

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(FN 18 Continued) seventeen. United States Bureau of the Census, Current Population Reports, A Statistical Portrait of Women in the United States, Table 7-5 (Series P-23, Report #58, (1976). See also the statistics cited in Taylor v. Louisiana, 419 U.S. 522, 535 n. 17 (1975).

19 Two-thirds of the 36 million women in the labor force work because of pressing economic need; either they are single, widowed, divorced, or separated, or they have husbands earning less than $7,000 per year. United States Dept. of Labor, Women's Bureau, Why Women Work (rev. ed. 1975). According to the Census Bureau, women appear to constitute the largest identifiable group of poor people in the nation. United States Bureau of the Census, Female Family Heads (Series P-23, Report #50, 1974).

headed by women.[20]

A totally gratuitous burden placed on the woman who works and has children is difficult to view as other than a lingering hangover from

> the days, extending into this century, when pregnant women were forced to remain at home--when pregnancy was viewed as "obscene". Koontz, "Childbirth and Childrearing Leave: Job-Related Benefits," 17 N.Y.L. Forum 480 (1971).

Cf. Cleveland Board of Education v. LaFleur, 414 U.S. 632 n. 9 (1974)(noting that the pregnancy policy at issue in that case had originally been inspired by a desire "to save pregnant teachers from embarassment at the hands of giggling school children," that pregnant women were forced off work at four months "because this was when the teacher 'began to show'," and that one employer thought students should not be exposed to pregnant teachers,

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20 Among white families, 10% of all families are headed by a woman; among black families, 35% are headed by a woman. United States Bureau of the Census, A Statistical Portrait, supra, Table 13-7. Among female-headed families, 24.9% of the white families were below the low-income level, as were 52% of the black families. Id. at Table 13-18.

"because some of the kids say, my teacher swallowed a watermelon, things like that." Certainly, Petitioner's asserted right to make a decision as to when Nora Satty should stop work based not simply of the company's interest but on her interest and that of her "unborn child", App. 10, 29-30,suggests a paternalism inappropriate to modern conditions, as does its policy of requiring women to wait until at least six weeks after childbirth before attempting to return to work. App. 65, 104.

In short, Petitioner invites this Court to open wide the doors to pernicious sex discrimiantion subjecting women to irremediable harm, by effectively adopting in Title VII's name an "anything goes" approach to personnel policies regarding pregnancy. This invitation should be firmly declined. Where, as in the instant case, there is no rhyme or reason for the policy, where the policy involves deprivation of an earned status or accumulated right rather than the mere withholding of an added benefit, where the policy harms working women throughout their entire working lives, the policy must be recognized by this Court for what it is--invidious discrimination against women with the effect of keeping them at the bottom of the ladder.

C. The EEOC Sex Discrimination Guideline, to the Extent That It Prohibits the Practice at Issue, is Entitled to Deference.

Congress left it to the EEOC to identify with specificity employment practices inconsistent with Title VII. As to the practice in question here, the EEOC specified:

> Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority...and reinstatement... shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities. 29 C.F.R. §1604.10 (b).

In stark contrast to Gilbert, the factors giving EEOC's interpretation "power to persuade" are plainly present in this instance: (1) the interpretation is consistent with EEOC's earlier pronouncements; and (2) no position in conflict with EEOC's has been taken by any other federal authority concerned with the implementation of legislation proscribing sex discrimination.

In Gilbert, a prime factor detracting from deference to the EEOC's 1972 position was the flatly contradictory position EEOC had taken at an earlier date. But in this case, no such

impediment exists. For the 1972 EEOC interpretation relevant here, i.e., the Commission's position on seniority and reinstatement, is fully consistent with EEOC's prior opinions. As early as 1966, the EEOC took the position that effective implementation of Title VII necessitated policies affording female employees reasonable job protection during pregnancy. EEOC First Annual Report to Congress 40 (1965-66). See also EEOC First Annual Digest of Legal Interpretations, July 1965-July 1966, Opinion Letter GC 218-66 (June 23, 1966).

Well before 1972, formal EEOC decisions reflected the agency's clear judgment that employer policies relating to termination on account of pregnancy and childbirth discriminated against women workers. See, e.g., CCH EEOC Decisions (1973) ¶6125 (June 16, 1969) (termination of an employee on the basis of pregnancy violates Title VII); CCH EEOC Decisions (1973) ¶6084 (December 16, 1969) (outright discharge based on refusal to place women on leave status for childbirth violates Title VII); CCH EEOC Decisions (1973) ¶6170 (September 17, 1970) (firing pregnant women in the sixth month of pregnancy violates Title VII); CCH EEOC Decisions (1973) ¶6184 (December 4, 1970) (termination of all unmarried pregnant employees, termination of married pregnant employees with less than two years service, and denial of reemployment absent a vacancy to married pregnant women with more than two years service violates Title VII.) On the

other hand, employer policies providing for full reinstatement following childbirth leave were approved by the Commission. See Case No. LA-68-4-538E, 2 FEP Cases 537 (June 16, 1969).

Furthermore, here, unlike Gilbert, no federal agency has promulgated regulations which conflict with the EEOC's position. In this case, the Equal Pay Act regulations are simply inapposite, since the Equal Pay Act does not deal with the terms and conditions of employment, such as seniority practices, or with hiring and firing practices, but simply prohibits a narrowly-defined form of wage discrimination. See 29 U.S.C. § 206 (d).[21] Moreover, to implement Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 et seq. (1974), the Department of Health, Education, and Welfare has adopted regulations, subsequently accepted by Congress, which explicitly take the same position as the EEOC guideline at issue. See 45 C.F.R.

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21 Senator Humphrey's remarks, cited in Gilbert but not fully analyzed there, suggest that the Equal Pay Act covers employment terms and conditions other than wages, since he asserted that the Equal Pay Act authorized employers to retire women earlier than men. However, this statement was clearly erroneous. See the Equal Pay Act, 29 U.S.C. § 206(d) and Manhart v. City of Los Angeles, ____ F. 2d ____, 13 FEP Cases 1625, 1631 (9th Cir. 1976).

§86.57(c):

> A recipient shall treat childbirth ...as any other temporary disability for all job related purposes, including...accrual of seniority... .

In sum, the Commission's position on seniority and reinstatement fully merits the deference generally accorded EEOC guidelines by the courts. See, e.g., Albermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

Ruth Bader Ginsburg
Marjorie Mazen Smith
Susan Deller Ross
Kathleen Willert Peratis
Joel Gora
American Civil Liberties Union Foundation
22 East 40th Street
New York, N.Y. 10016
(212) 725-1222

Judith Lichtman
Women's Legal Defense Fund
1424 Sixteenth Street, N.W.
Washington, D.C. 20036

Attorneys for the American Civil Liberties Union and Women's Legal Defense Fund as Amici Curiae

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